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Hooman Khanloo v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–26–01 OF 2013
MOHTARUDIN BAKI, AHMADI ASNAWI AND ABDUL RAHMAN SEBLI JJCA
2 JUNE 2015

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Criminal Procedure — Trial — Dangerous Drugs Act 1952 (Act 234) ('DDA') — Whether presumption under s 37(d) DDA that accused had mens rea possession of drugs must be invoked whenever it was proved he had custody or control of drugs — Whether presumption should be invoked even where mens rea possession could D *be established by direct evidence — Whether presumption of knowledge under s 37(d) could co-exist with presumption of trafficking under s 37(da) DDA such accused bore burden of disproving both presumptions*

The appellant, an Iranian national, was convicted and sentenced to death by E the High Court for trafficking in 61.74g of methamphetamine, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). A police party found the drugs when they raided a hotel room rented by the appellant. The drugs were together with the appellant's wristwatch and passport in the upper drawer of a small cabinet beside a bed. The appellant's urine tested F positive for methamphetamine and it was the evidence of one of the members of the police party that the appellant appeared panicky when the search of the room was underway and that when the drugs were found he appeared 'shocked and frightened and had asked to be released'. The appellant's defence was that he had no knowledge of the drugs or how they came to be in the cabinet drawer. G He suggested it could have been placed there by any of his Iranian friends who frequented the room or by someone from the hotel's housekeeping department. The trial court found the appellant's defence 'hollow and unworthy of belief' and ruled that he was knowingly in possession of the drugs and that in view of the quantity of the drugs involved the presumption that he H was trafficking in them was invoked under s 37(da) of the DDA. The trial court held the appellant failed to rebut the said presumption or to cast a reasonable doubt on the prosecution's case which had been proved beyond reasonable doubt. In his instant appeal against conviction and sentence, the appellant's main ground was that since the prosecution failed to prove that he had I exclusive use of the hotel room and, consequently, that he had exclusive possession of the drugs, the trial court should not have convicted him on the charge of trafficking.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) (per Abdul Rahman Sebli JCA) There was no law to say the prosecution had to prove the appellant had exclusive use of the room before a conviction under s 39B(1)(a) of the DDA could be sustained. If the prosecution did not have to prove he had exclusive possession of the drug before the presumption of trafficking could be invoked against him, by the same token, there was no reason why exclusive use of the room had to be established. Once mens rea possession was established against the appellant, it was immaterial if he had exclusive use of the room or otherwise. As the amount of the drugs in the appellant's possession exceeded the minimum prescribed by s 37(da) of the DDA, the court had to act on the supposition the drugs were for the purpose of trafficking until the contrary was proved by the appellant (see paras 27, 29–30 & 32).

(2) (per Abdul Rahman Sebli JCA) Since the trial judge found that the drug was in the appellant's possession at the time of his arrest, as a matter of common sense he must have had custody or control of the drug as well. By operation of s 37(d) of the DDA, the appellant was deemed to have had knowledge of the drug and the legal burden shifted to him to prove he had no knowledge. Having regard to the legislative scheme of s 37 of the DDA, the court was of the view the presumption of knowledge under s 37(d) continued to operate even where the presumption of trafficking under s 37(da) operated against the appellant. This did not offend the rule against the invoking of double presumption as the factual elements that triggered the activation of these two presumptions were entirely different. Trafficking was presumed from 'possession' whereas knowledge was presumed from custody or control of the drug (see paras 39 & 43–44).

(3) (per Abdul Rahman Sebli JCA) The appellant failed to discharge the burden of rebutting the presumption of trafficking under s 37(da) of the DDA. He sidestepped that burden by raising a defence of 'no knowledge', but that line of defence did not go towards proving the drug was not for the purpose of trafficking. The presumption of trafficking remained unrebutted (see paras 45–46).

(4) (per Abdul Rahman Sebli JCA) The appellant did not explain how his wristwatch and passport came to be in the same drawer where the drug was found. Although he argued there was a real possibility the drug was left in the room by someone else, that possibility had to be tested against, and in the light of, evidence that the appellant panicked when the search was in progress and was in a state of shock and had asked to be released when the drug was found. This conduct was inconsistent with innocence. No plausible explanation was proffered by the appellant for having behaved that way. He was duty-bound to have explained his conduct under s 9 of the Evidence Act 1950. The appellant also denied ever having

taken drugs but the unchallenged evidence was that he tested positive for It was not surprising therefore that the trial judge disbelieved his explanation. The explanation was insufficient to rebut the presumption of knowledge. On the evidence, the trial judge concluded that the defence was a fabrication concocted at a late stage in an attempt to avoid culpability. Based on the probabilities of the case and the evidence, there was nothing wrong with the trial judge's conclusion to warrant appellate intervention (see paras 19, 58–60 & 62).

(5) (**per Ahmadi Asnawi JCA, dissenting**)The issue of the appellant having to carry the burden of rebutting the presumption of knowledge (and possession) under s 37(d) of the DDA did not arise. The trial judge clearly did not invoke the presumption under s 37(d) to attribute possession and knowledge of the drug to the appellant because the totality of the evidence was sufficient to prove possession and knowledge from the surrounding facts and circumstances. On finding the appellant had actual mens rea possession based on evidence that the drug was found in a drawer together with the appellant's personal belongings, including his passport, the trial judge went on to invoke the presumption of trafficking under s 37(da)(xvi) of the DDA. The s 37(d) presumption was not an automatic mechanism compelling a trial court to invoke the said presumption once custody or control was established. If there was direct evidence upon which an inference of knowledge could be drawn against the accused, there was no necessity to invoke the s 37(d) presumption (see paras 8–9, 11, 15 & 20).

[Bahasa Malaysia summary

Perayu, seorang warganegara Iran, telah disabit dan dihukum mati oleh Mahkamah Tinggi kerana mengedar 61.74g methamphetamine, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Sepasukan polis menemui dadah semasa mereka membuat serbuan ke bilik hotel yang disewa oleh perayu. Dadah itu bersama-sama jam tangan dan passport perayu dalam laci atas almari kecil di sebelah katil. Air kencing perayu diuji positif untuk methamphetamine dan ia adalah keterangan salah seorang anggota polis bahawa perayu kelihatan gementar semasa carian ke atas bilik itu berjalan dan bahawa semasa dadah itu ditemui dia kelihatan '*shocked and frightened and had asked to be released*'. Pembelaan perayu adalah bahawa dia tiada pengetahuan tentang dadah itu atau bagaimana ia berada dalam laci almari itu. Dia mencadangkan ia mungkin diletakkan di situ oleh mana-mana kawan Irannya yang sering ke bilik itu atau oleh seseorang daripada bahagian pengurusan pembersihan hotel itu. Mahkamah perbicaraan mendapati pembelaan perayu '*hollow and unworthy of belief*' dan memutuskan bahawa dia dengan pengetahuan memiliki dadah itu dan bahawa berdasarkan kuantiti dadah yang terlibat maka andaian yang dia mengedar dadah telah dibuat di bawah s 37(da) ADB. Mahkamah perbicaraan memutuskan perayu telah gagal

mematahkan andaian tersebut atau menimbulkan keraguan munasabah ke atas kes pendakwaan yang telah dibuktikan melampaui keraguan munasabah. Dalam rayuannya terhadap sabitan dan hukuman, alasan utama perayu adalah oleh kerana pendakwaan gagal membuktikan bahawa dia mempunyai penggunaan eksklusif terhadap bilik hotel itu dan, juga, bahawa dia mempunyai milikan eksklusif dadah itu, mahkamah perbicaraan tidak patut mensabitkannya atas pertuduhan pengedaran.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) (oleh Abdul Rahman Sebli HMR) Tiada undang-undang untuk mengatakan pendakwaan patut membuktikan perayu mempunyai penggunaan eksklusif bilik itu sebelum sabitan di bawah s 39B(1)(a) ADB boleh dikekalkan. Jika pendakwaan tidak perlu membuktikan dia mempunyai milikan eksklusif terhadap dadah itu sebelum andaian pengedaran boleh dibuat terhadapnya, dengan alasan yang sama, tiada sebab kenapa penggunaan eksklusif bilik itu patut dibuktikan. Setelah milikan mens rea dibuktikan terhadap perayu, ia tidak penting jika dia mempunyai penggunaan eksklusif bilik itu atau sebaliknya. Oleh kerana jumlah dadah dalam milikan perayu melebihi minimum yang ditetapkan oleh s 37(da) ADB, mahkamah perlu bertindak dengan anggapan dadah itu adalah bagi tujuan pengedaran sehingga yang sebaliknya dibuktikan oleh perayu (lihat 27, 29–30 & 32).

(2) (oleh Abdul Rahman Sebli HMR) Oleh kerana hakim perbicaraan mendapati bahawa dadah itu dalam milikan perayu pada masa tangkapannya, mengikut akal dia semestinya mempunyai jagaan atau kawalan ke atas dadah itu juga. Melalui operasi s 37(d) ADB, perayu dianggap mempunyai pengetahuan tentang dadah itu dan beban sah brealih kepadanya untuk untuk membuktikan dia tiada pengetahuan. Setelah mengambil kira skim perundangan s 37 ADB, mahkamah berpendapat andaian pengetahuan di bawah s 37(d) terus beroperasi walaupun andaian pengedaran di bawah s 37(da) terpakai terhadap perayu. Ini tidak bercanggah dengan peraturan terhadap penggunaan andaian berganda kerana elemen-elemen faktual yang menyebabkan berlaku dua andaian tersebut berbeza sangat. Pengedaran diandaikan daripada '*possession*' manakala pengetahuan diandaikan daripada jagaan atau kawalan dadah itu (lihat perenggan 39 & 43–44).

(3) (oleh Abdul Rahman Sebli HMR) Perayu gagal melepaskan beban mematahkan andaian pengedaran di bawah s 37(da) ADB. Dia mengetepikan beban tersebut dengan menimbulkan pembelaan 'no knowledge', tetapi alasan pembelaan itu tidak dapat membuktikan dadah itu bukan bagi tujuan pengedaran. Andaian pengedaran masih kekal tidak dipatahkan (lihat perenggan 45–46).

(4) (oleh Abdul Rahman Sebli HMR) Perayu tidak menjelaskan bagaimana

jam tangan dan pasportnya berada di dalam laci yang sama di mana dadah itu ditemui. Walaupun dia berhujah terdapat kebarangkalian dadah itu ditinggalkan dalam bilik itu oleh seseorang, kebarangkalian itu perlu diuji terhadap, dan berdasarkan, keterangan bahawa perayu gelabah apabila carian dijalankan dan berada dalam keadaan terkejut dan meminta untuk dilepaskan apabila dadah itu ditemui. Perlakuan ini tidak konsisten dengan sikap tidak bersalah. Tiada penjelasan nyata dibuat oleh perayu kerana berkelakuan sedemikian. Dia mempunyai kewajipan untuk menjelaskan perlakuannya di bawah s 9 Akta Keterangan 1950. Perayu juga menafikan telah mengambil dadah tetapi keterangan yang tidak dicabar adalah bahawa dia diuji positif kerana methamphetamine. Ia tidak mengejutkan bahawa hakim perbicaraan tidak mempercayai penjelasannya. Penjelasan itu tidak mencukupi untuk mematahkan andaian pengetahuan. Berdasarkan keterangan, hakim perbicaraan memutuskan bahawa pembelaan itu adalah satu pemalsuan yang direka di saat akhir dalam percubaan mengelakkan kebersalahan. Berdasarkan kebarangkalian kes dan keterangan, tiada apa-apa yang salah dengan kesimpulan hakim bagi mewajarkan campur tangan perayu (lihat perenggan 19, 58–60 & 62).

(5) (oleh Ahmadi Asnawi HMR, menentang) Isu perayu mempunyai beban mematahkan andaian pengetahuan (dan milikan) di bawah s 37(d) ADB tidak timbul. Hakim perbicaraan jelas tidak menggunakan andaian di bawah s 37(d) untuk mengatakan milikan dan pengetahuan tentang dadah itu terhadap perayu kerana kekeluruhan keterangan adalah mencukupi untuk membuktikan milikan dan pengetahuan daripada fakta dan keadaan sekeliling. Setelah mendapati perayu mempunyai milikan mens rea sebenar berdasarkan keterangan bahawa dadah itu ditemui dalam laci bersama barang milik peribadi perayu, termasuk pasportnya, hakim perbicaraan telah menggunakan andaian pengedaran di bawah s 37(da)(xvi) ADB. Andaian s 37(d) bukan mekanisme automatik yang mendesak mahkamah perbicaraan menggunakan andaian tersebut setelah jagaan atau kawalan dibuktikan. Jika terdapat keterangan langsung ke atas inferens pengetahuan boleh dibuat terhadap tertuduh, tiada keperluan untuk menggunakan andaian s 37(d) (lihat perenggan 8–9, 11, 15 & 20).]]]

Notes

For a case on Dangerous Drugs Act 1952 (Act 234), see 5 *Mallal's Digest* (5th Ed, 2015) para 5666.

Cases referred to

Chan Pean Leon v PP [1956] 1 MLJ 237; [1956] 1 LNS 17 (refd)

Cohen Lorraine Philis & Anor v PP and another appeal [1989] 3 MLJ 289; [1989] 1 CLJ Rep 18, SC (refd)

Emmanuel Yaw Teiku v PP [2006] 5 MLJ 209; [2006] 3 CLJ 597, FC (refd)
Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)
Mat v PP [1963] 1 MLJ 263; [1963] 1 LNS 82 (refd)
Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 1 CLJ (Rep) 311, SC (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)
Ng Chai Kem lwn Pendakwa Raya [1994] 2 MLJ 210; [1994] 2 CLJ 593, SC (refd)
Ng Eng Kooi & Anor v PP [1970] 1 MLJ 267, FC (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
PP v Abdul Manaf Muhamad Hassan [2006] 3 MLJ 193; [2006] 2 CLJ 129, FC (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 37, FC (refd)
PP v Denish a/l Madhavan [2009] 2 MLJ 194; [2009] 2 CLJ 209, FC (refd)
PP v Hamid Shamsi Kavishashi [2015] 3 CLJ 789 (refd)
PP v Salleh bin Zakaria & Anor [2010] 4 MLJ 25; [2010] 4 CLJ 671, CA (refd)
PP v Yuvaraj [1969] 2 MLJ 89; [1968] 1 LNS 116; [1970] AC 913, PC (refd)
PP v Zulkifli bin Arshad [2011] 1 MLJ 599; [2010] 6 CLJ 121, FC (refd)
Samundee Devan a/l Muthu Kerishnan v PP [2010] 2 MLJ 607; [2010] 3 CLJ 269, FC (refd)
Siew Yoke Keong v PP [2013] 3 MLJ 630, FC (refd)
Wong Nam Loi v PP [1997] 3 MLJ 795; [1998] 1 CLJ 37, CA (refd)

Legislation referred to

Criminal Procedure Code s 182A(1)
Dangerous Drugs Act 1952 ss 12(2), 37, 37(d), 37(da), 37(da)(xvi), 37A(1), 39A, 39A(2), 39B, 39B(2), 39B(1)(a), First Schedule
Evidence Act 1950 ss 9, 102, 114

Appeal from: Criminal Trial No 45–39–2011 (High Court, Kuala Lumpur)

Ramkarpal Singh (Zaleha Al-Hayat with him) (Karpal Singh & Co) for the appellant.
Tengku Intan Suraya bt Tengku Ismail (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Rahman Sebli JCA (delivering majority decision of the court):

[1] The appellant, an Iranian national was charged with trafficking in a dangerous drug and the charge against him was as follows:

> Bahawa kamu pada 20 February 2011 jam lebih kurang 8 malam, di dalam bilik no 1109 Cabbana Inn Hotel, Jalan Sultan, di dalam Daerah Dang Wangi, di dalamBandaraya Kuala Lumpur, Wilayah Persekutuan, telah mengedar dadah

berbahaya iaitu Methamphetamine seberat 61.74 gram, dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta Dadah Berbahaya 1952 Akta yang sama.

[2] At the conclusion of the trial he was found guilty and sentenced to death by the Kuala Lumpur High Court. This is his appeal against the conviction and sentence. Having heard arguments by both parties, we dismissed his appeal by a unanimous decision.

[3] My learned brothers Justice Mohtarudin Baki and Justice Ahmadi Hj Asnawi have read this judgment and have approved the same except that for Justice Ahmadi Hj Asnawi, His Lordship has a dissenting view on the application of the statutory presumption under s 37(d) of the Dangerous Drugs Act 1952 ('the DDA') and has written separate grounds in respect thereof.

[4] The facts may briefly be stated as follows. On 20 February 2011 at about 8pm C/Insp Suresh a/l D Muniandy (PW4) was carrying out 'Operasi Tapis' at Jalan Tun Razak with five other police officers. When they were in the vicinity of Cabbana Inn Hotel ('Cabbana Hotel'), PW4 saw a male Indian walking towards the hotel in a suspicious manner. He was seen entering Cabbana Hotel and into the lift. PW4 noticed that the lift stopped at the 11th floor.

[5] PW4 and his team went up to the 11th floor using the lift. On their arrival at the floor, the male Indian was standing in front of the door to room 1109 and the door was opened from inside by a man later identified as the appellant. There is no dispute that this room was registered under the appellant's name.

[6] A search was then carried out on the male Indian by two members of the police team but nothing incriminating was found on him. He was also tested for methamphetamine but the test result was negative. This male Indian turned out to be a taxi driver by the name of Murugan a/l Ayyavoo who had merely gone to the room to fetch the appellant on a prior appointment. He was called as a prosecution witness (PW7).

[7] PW4 and the rest of the team entered room 1109 and carried out a search. From inside the upper drawer of a small cabinet located on the right side of the bed, PW4 found a plastic packet containing substances believed to be drug along with the appellant's personal belongings, namely his wristwatch and passport. From the dressing table the police found a Sony Erricson handphone, RM20 cash, Iranian currency 10500 and the key to room 1109.

[8] The appellant's urine sample that was taken later at the police station tested positive for methamphetamine. According to PW4, the accused panicked when the search was being carried out in room 1109 and after the drug was found, he was in a state of shock and asked to be released ('*dalam keadaan terkejut, takut dan minta dilepaskan*').

[9] The cross-examination of PW4 revealed that when the search in the room was over, someone knocked the door from the outside. It was an Iranian man by the name of Hameed Reza. He was arrested and later charged with possession of a dangerous drug under s 37A(1) of the DDA. His arrest was the subject of a separate police investigation.

[10] The plastic packet that was found in the drawer of room 1109 was sent for analysis and confirmed by the Chemist Maimonah bt Sulaiman(PW3) to contain 61.74g of methamphetamine, a dangerous drug listed in the First Schedule of the Dangerous Drugs Act 1952. The learned trial judge found no issue with the identity of the drug. Possession without lawful authority of 50g or more of this drug triggers the presumption of trafficking under s 37(da) of the DDA.

[11] On these facts, the learned trial judge was satisfied, relying on *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805 that a prima facie case of trafficking had been established against the appellant and accordingly called for his defence. It was her finding that the appellant was in mens rea possession of the drug, meaning to say he was knowingly in possession of the drug. The appellant was therefore presumed to be trafficking.

[12] In stating his defence the appellant chose to give evidence on oath. His explanation was as follows. Before his arrest on 20 February 2011 he worked as a pilot in Iran. He came to Malaysia on 11 February 2011 on a holiday and it was only his second visit to Malaysia. On this occasion he said he came with three other Iranians namely Mohamad, Hameed Afshar and Parna. He confirmed that room No 1109 of Cabbana Hotel was rented under his name. He said Mohamad and his girlfriend (Parna) stayed in the room to the left of room 1109 while Hameed stayed with his relative in Ampang.

[13] The appellant went on to explain that room 1109 was not used exclusively by him as his friends Mohamad, Hameed Afshar, Parna, Nilofar (a female) and Iman (a male), all Iranians had also been to the room from 11 February 2011 to 20 February 2011. According to him Iman even stayed with him in the room for one night before he left for Thailand. He said he 'might' have given the room key to Iman and Hameed when they wanted to use the washroom or when they wanted to put their shopping bags inside the room.

[14] The appellant added that shortly before his arrest on 20 February 2011, PW7 came over to his room to fetch him as he had an appointment with Nilofar. He explained that prior to 20 February 2011 he had used PW7's taxi for 'clubbing' and going to Nilofar's house. According to him PW7 stayed in the room for five to ten minutes. Then he heard a knock on the door and when he opened it, a gun was pointed into the room. He said he was then handcuffed from behind by PW4.

[15] There was no suggestion in cross-examination nor in argument before us that PW7 had anything to do with the drug. Therefore nothing more should beread into the appellant's evidence that PW7 was present in room 1109 for five to ten minutes before the arrival of the police. With regard to the discovery of the drug, the appellant confirmed PW4's evidence that the plastic packet was found from the drawer in room 1109. This is what he said in his evidence:

> They started searching the room. One of them went directly to the drawer and he took a white plastic the size of normal photo out of the drawer with his thumb and forefinger and he said he was looking for that. I do not know if it was a packet or not but it looked like it was sealed.

[16] He was however unable to identify if exh P8 was the plastic packet that the police found in the drawer. He denied that he was in a state of shock and had asked to be released after the drug was found. He said he had no idea how the drug came to be in the drawer. He denied that the drug belonged to him. He said he did not know anything about the drug.

[17] Without a doubt the appellant's defence was that he had no knowledge of the drug. It was his suggestion that the drug 'could have' been left behind by any of his Iranian friends or the hotel maid. According to him the hotel maid cleaned the room daily regardless of whether he was present in the room or otherwise.There was even a suggestion that someone hoping for a reward 'could have' placed the drug inside the drawer.

[18] In the light of the evidence established by the prosecution at the close of its case, particularly the appellant's conduct during the search and after the discovery of the drug, his defence can be described as nothing more than a bare denial. He offered no plausible explanation as to why he panicked when the search was being carried out and then asking to be released when the drug was found. If indeed he had nothing to do with the drug, there was no reason for him to panic and asking to be released.

[19] By virtue of s 9 of the Evidence Act 1950 the appellant was duty bound to explain his conduct: *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717. A bare denial is not sufficient to dislodge the evidence established by the prosecution. Nor did the appellant explain how his

wristwatch and passport came to be in the same drawer where the drug was found except to contradict the prosecution's evidence.

[20] Having weighed all the relevant facts, the learned trial judge found that the appellant failed to cast any reasonable doubt as to the truth of the prosecution's case. She was satisfied that the case against the appellant had been proved beyond any reasonable doubt. She rejected the defence suggestion that the drug could have been left behind by his friends. Her finding is at p 142 of the record of appeal, as follows:

> The court has looked at the totality of this evidence to see if this vague suggestion of friends visiting him in his room or using his bathroom or room to put their shopping bags could have the effect of dislodging the evidence adduced as regards the recovery of the packet of dangerous drugs from the drawer of a cabinet in the room which was rented by the accused. The court is of the considered view that the accused's attempt, albeit most feeble, to deflect liability by suggesting that his friends might have placed or kept the packet of drugs in the drawer, is most hollow and unworthy of belief. The court is in a quandary as to why the accused's friends would want to do such a thing. The ambivalent manner in which the accused suggests that he 'might have' given the key to his friends to use the bathroom or to put away their shopping raises the question: Why 'might have'? Didn't the accused know?

[21] As for the appellant's suggestion that it could be the work of the hotel maid, the learned judge's finding was as follows:

> Similarly, the court finds that the accused's fleeting attempt to suggest that housekeeping had cleaned his room daily regardless whether he was present in his room to be but an attempt to clutch straws. The accused cannot seriously expect the court to believe in the possibility that someone from housekeeping would put a packet of drugs in his drawer. Similarly, the court cannot accept that the raiding team or anyone else would have placed the drugs in the accused's drawer merely to obtain a reward.

[22] In this appeal, counsel for the appellant raised three issues, namely:

(1) there was a contradiction between the prosecution's opening address (P3) and the evidence of PW4;

(2) the appellant had no exclusive use of room No 1109; and

(3) there was access by other persons to room No 1109.

[23] Ground 1 relates to the learned DPP's statement in the opening address (P3) that the plastic packet containing the drug was found '*di bahagian atas laci di tepi katil*'. According to counsel this contradicted PW4's testimony that the plastic packet was found '*pada laci sebelah kanan katil di bahagian atas*'. We found no substance to the argument as it is clearthat the plastic packet was

found inside the upper drawer of the cabinet and not on the cabinet itself.

[24] We found nothing in the learned DPP's opening statement to support counsel's suggestion that the plastic packet was found on the cabinet. The words '*di bahagian atas laci di tepi katil*' in the opening statement must be understood in the context of PW5's description of the cabinet as '*meja jenis laci, ada 2 laci*'. Clearly it was a cabinet with two drawers, one on top of the other and the drug was found inside the top drawer. It is worth noting that even the appellant himself in his evidence described it as 'a cabinet with two or three drawers'. More importantly he confirmed that the plastic packet was taken by PW4 from inside a drawer. Ground 1 must fail.

[25] Grounds 2 and 3 relate to a common issue and we shall deal with them together. The first thing to note with regard to these grounds is that theywere directed at the learned trial judge's finding that the appellant was knowingly in possession of the drug. In her judgment the learned trial judge made it clear that she rejected the appellant's story that the drug could have been put in the drawer by his Iranian friends or the hotel maid without his knowledge.

[26] The learned trial judge's finding was that the appellant's explanation was 'unworthy of belief'. We found no reason to interfere with this finding of fact which no doubt depended on the credibility and reliability of the appellant as a witness. On the evidence before her and having seen the appellant giving evidence, the learned trial judge was perfectly entitled to arrive at such finding.

[27] The thrust of the appellant's argument in the High Court and repeated before us was that the prosecution failed to prove exclusive use of room 1109 and that therefore the appellant had no exclusive possession of the drug. It follows, going by the argument, that the appellant could not have been trafficking in the drug. We found no merit in the argument. First of all there is no law to say that the prosecution must prove exclusive use of a room before a conviction under s 39B(1)(a) of the DDA can be sustained.

[28] What the prosecution needs to establish to bring home a charge under s 39B(1)(a) of the DDA is possession of the drug and that the accused was trafficking in it.To prove these two elements the prosecution is aided by the statutory presumptions under ss 37(d) and 37(da) of the DDA. We shall come back to these two presumptions shortly.

[29] With regard to the question of possession, it has been decided by the apex court in *Public Prosecutor v Denish a/l Madhavan* [2009] 2 MLJ 194; [2009] 2 CLJ 209 that proof of possession need not be exclusive to the accused. It is therefore unnecessary for the prosecution to prove exclusive possession of

the drug before the presumption of trafficking could be invoked against the appellant.

[30] By the same token, if possession of the subject matter of the charge need not be exclusive, there is no reason why exclusive use of the room must be established. Once mens rea possession is established against the appellant, it is immaterial if he had exclusive use of the room or otherwise.

[31] If exclusive use of a hotel room were a relevant factor in considering whether possession is established, it will virtually be impossible for the authorities to enforce the drug laws as it will always be open to the defence to point out, and rightly so, that at one point or another, someone else would have had prior access to the room. Surely the hotel management itself would have had access to the room.

[32] The amount of drug found in the appellant's possession exceeded the minimum prescribed by s 37(da) of the DDA. The court must therefore act on the supposition that the drug in the appellant's possession was for the purpose of trafficking, 'until the contrary is proved' by the appellant: *Public Prosecutor v Zulkifli bin Arshad* [2011] 1 MLJ 599; [2010] 6 CLJ 121.

[33] In point of law, if the appellant failed to adduce any evidence to rebut the presumption of trafficking, he must be convicted of the offence charged as the fact presumed, ie that the drug was for the purpose of trafficking would have remained unrebutted. The fact that the prosecution adduced no evidence to prove that the drug was for the purpose of trafficking is irrelevant. It was for the appellant to displace the presumption. This is implicit in s 102 of the Evidence Act 1950 ('the Evidence Act') which provides as follows:

> 102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

[34] This brings us to the issue of knowledge, which is an essential ingredient of the offence of trafficking as knowledge is the sine qua non of 'possession'. Section 37(d) of the DDA is relevant and stipulates as follows:

> 37. In all proceedings under this Act or any regulation made thereunder –
>
> (d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.'(Emphasis added)

[35] The golden rule of statutory interpretation is that ordinary words must be given their ordinary meanings and technical words their technical meanings,

unless absurdity would result. It is be noted that there are two things presumed by s 37(d), the first being 'possession' of the drug and secondly 'knowledge' as to the nature of the drug. In *Public Prosecutor v Hamid Shamsi Kavishashi* [2015] 3 CLJ 789 this court held the view that the word 'possession' in s 37(d) cannot mean possession as the word is understood in criminal law, ie possession with both the physical and mental elements. This is what the court said:

> These twin elements must be present before there can be 'possession'. Does this mean that the burden on the respondent was not only to rebut the mental element of 'possession' (which is knowledge) but also to rebut by proving on the balance of probabilities that he was not in physical possession of the drug, the physical element of possession? Interpreted literally that seems to be what s 37(d) of the DDA mean to say.
>
> In our view that cannot be the proper construction to be given to the word 'possession' in the first part of s 37(d) as it will lead to an absurdity because by being found in physical custody or control of the drug, the accused was already in physical possession of the drug. It is absurd in the circumstances to presume that he was in physical possession of the drug, which is another way of saying that he was in custody or control of the drug. Therefore the real intent and purport of s 37(d) must be to presume, upon proof of custody or control, knowledge only which is the mental element of 'possession'. This is covered by the second part of the provision. The first part, if at all must be a reference to physical possession only.

[36] Obviously the intention of Parliament in enacting s 37(d) of the DDA is to relieve the prosecution of the burden of proving knowledge, which is another way of saying that the prosecution need not prove knowledge. By the reversal of the onus of proof, it is for the accused to prove in the negative that he had no knowledge of the drug and not for the prosecution to prove positively that he had the requisite knowledge.

[37] In our view that is the proper construction to be given to the words 'until the contrary is proved' in s 37(d). These words mean that until and unless the accused proves to the contrary on the balance of probabilities, the law (and not the judge nor the public prosecutor) presumes as a matter of fact that he had knowledge of the drug.

[38] It is a supposition of law that requires no deliberation on the part of the trial judge in deciding whether to apply or not to apply the presumption once custody or control is established: *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170 (FC). The word 'shall' used in the section connotes it mandatory nature. This is different from, for example drawing inferences under s 114 of the Evidence Act which uses the word 'may'. The only question for the trial court to consider is whether the presumption applies on the facts. If it applies then the accused must be deemed to have had knowledge of the drug.

[39] In the present case, since the learned trial judge's finding was that the drug was in the appellant's possession at the time of his arrest, he must as a matter of common sense have had custody or control of the drug as well. Therefore, by operation of s 37(d) of the DDA, he is deemed to have had knowledge of the drug. The legal burden then shifted to the appellant to prove that he had no knowledge.

[40] Before the present s 37A(1) of the DDA came into effect on 15 February 2014, it was not permissible to invoke the presumption of 'possession' under s 37(d) to further invoke the presumption of 'trafficking' under s 37(da): *Muhammed bin Hassan*. It was held in that case that the presumption of trafficking under s 37(da) can only be invoked upon affirmative proof of possession and not by way of presumption upon presumption. In other words knowledge must be proved by affirmative evidence and not by invoking the presumption under s 37(d). The present appeal, being a case prior to the amendment, is still subject to this pronouncement of law.

[41] The question is whether the presumption of knowledge under s 37(d) ceases to operate and becomes a dead letter of the law once the presumption of trafficking under s 37(da) is invoked.This is an important question as it relates to the fundamental question of burden of proof. If the presumption of knowledge under s 37(d) applies alongside the presumption of trafficking under s 37(da), the burden on the appellant would be to rebut bothpresumptions on the balance of probabilities and not merely to cast a reasonable doubt on the facts presumed, ie firstly that he had knowledge of the drug and secondly that the drug was for the purpose of trafficking.

[42] If the appellant had succeeded in rebutting the presumption of 'trafficking' he would of course have been acquitted of the offence charged, which is trafficking. But even if he did, he still had to rebut the presumption of knowledge failing which he would be convicted of the lesser offence of possession under s 12(2) read with s 39A(2) of the DDA because failure to do so would mean that he was in possession of the drug, short of trafficking. The appellant would only be entitled to a total acquittal if he succeeded in rebutting the presumption of knowledge.

[43] Having regard to the legislative scheme of s 37 of the DDA we are of the view that the presumption of knowledge under s 37(d) continues to operate against the accused person even where the presumption of trafficking under s 37(da) operates against him.This does not offend the rule against double presumption because the question of invoking the presumption under s 37(d) to further invoke the presumption under s 37(da) does not arise at all. Trafficking is presumed because the accused was found in 'possession' of the

drug whilst knowledge is presumed because he was found in custody or control of the drug.

[44] Thus the factual elements that trigger the activations of these two presumptions are entirely different. Trafficking is presumed from 'possession' whereas knowledge is presumed from custody or control. To our mind the position is this: If there is affirmative evidence to prove 'possession' independent of the presumption under s 37(d), trafficking is presumed. If there is no such evidence of 'possession' but nevertheless custody or control has been established, trafficking is not presumed but knowledge is by virtue of s 37(d). In that situation trafficking can still to be proved by some other affirmative evidence without relying on the presumption under s 37(da): *Public Prosecutor v Abdul Manaf Muhamad Hassan* [2006] 3 MLJ 193; [2006] 2 CLJ 129 (FC).

[45] In the present case, despite bearing the burden of rebutting the presumption of trafficking under s 37(da), being in possession of more than the minimum weight prescribed by s 37(da)(xvi) of the DDA ,the appellant chose not to discharge that burden. Not a shred of evidence was adduced by the appellant to show that the drug was not for the purpose of trafficking, as was done by the appellant in the Supreme Court case of *Cohen Lorraine Philis & Anor v Public Prosecutor and another appeal* [1989] 3 MLJ 289; [1989] 1 CLJ Rep 18.

[46] What the appellant did in this case was to sidestep his burden of rebutting the presumption of trafficking by raising a defence of 'no knowledge', which did not go towards proving that the drug was not for the purpose of trafficking. The presumption of trafficking therefore remained unrebutted. The question that remains to be considered is whether he had discharged his burden of rebutting the presumption of knowledge under s 37(d) of the DDA.

[47] For all intents and purposes the defence of no knowledge raised by the appellant is a defence that he was not even in 'possession' of the drug because without knowledge possession would only be physical possession, which is not an offence. It is a defence of total avoidance in the sense that if the appellant succeeded in proving, on the balance of probabilities that he had no knowledge of the drug (and therefore no possession), he would not even be liable to be convicted of the lesser offence of possession, custody or control under s 12(2) read with s 39A(2) of the DDA .

[48] In *Cohen Lorraine Philis* the appellant admitted 'possession' (meaning to say she admitted knowledge of the drug) but went on to produce proof that the drugwas not for the purpose of trafficking, in rebuttal of the presumption of trafficking that appliedagainst her. She failed in the High Court but succeeded in the Supreme Court whereby her conviction under s 39B of the

DDA was set aside and substituted with a conviction for the lesser offence of possession under s 39A of the DDA.

[49] The Federal Court decision in *Muhammed bin Hassan* is authority for the proposition that the presumption of 'possession' under the first part of s 37(d) cannot be used to further invoke the presumption of trafficking under s 37(da). However this must not be understood to mean that where the presumption of trafficking is triggered by affirmative evidence of possession, the presumption of knowledge as to the nature of the drug, which falls under the second part of s 37(d) ceases to have effect.

[50] We appreciate the appellant's right to decide on his line of defence, but by adopting the defence of 'no knowledge', ie 'no possession' rather than the defence of 'no trafficking', he had completely failed to discharge his burden of rebuttingthe presumption of trafficking, which clearly applied against him.

[51] Given the line of defence adopted by the appellant, the learned trial judge was not expected to make a finding that the drug was not for the purpose of trafficking for the simple reason that there was no material before the court for her to make such finding. What was before the learned trial judge was only the appellant's claim that he had no knowledge of the drug. It is axiomatic that the court acts on evidence laid before it and nothing else. Be that as it may the learned judge nevertheless proceeded to consider whether the presumption of trafficking had been rebutted and it was her finding that the appellant failed to rebut the presumption.

[52] The consequence of a failure to rebut a statutory presumption of fact which forms a necessary factual ingredient of the offencehas been explained by Lord Diplock speaking for the Privy Council in *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89; [1968] 1 LNS 116; [1970] AC 913 where he said:

> Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or to disprove any fact: it is sufficient for his acquittal if any of the facts which if they existed would constitute the offence with which he is charged are 'not proved'. But exceptionally, as in the present case, an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be presumed or deemed to exist 'unless the contrary is proved'. In such a case the consequence of finding that that particular fact is 'disproved' will be an acquittal, whereas the absence of such finding will have the consequence of a conviction. (Emphasis added.)

[53] The pronouncement is clear. It is to the effect that if the accused succeeds in discharging his burden of proof, he will be acquitted of the offence charged but if he fails, he must be convicted. The case had been cited with approval by the Federal Court in *Ng Eng Kooi & Anor v Public Prosecutor*

[1970] 1 MLJ 267 and *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 37 and by the then Supreme Court in *Cohen Lorraine Philis & Anor v Public Prosecutor and another appeal* [1989] 3 MLJ 289; [1989] 1 CLJ Rep 18 and *Ng Chai Kem lwn Pendakwa Raya* [1994] 2 MLJ 210; [1994] 2 CLJ 593. In the former case the Supreme Court recognised that the law on statutory presumptions as stated in *Yuvaraj* has become 'part of our law'. It may be argued that the passage quoted in bold above is obiter dictum (the issue in that case being quantum of proof) but the fact remains that the decision has crystallised into our law.

[54] In *Abdul Rahman bin Akif* the Federal Court in allowing the prosecution's appeal and reinstating the conviction and death sentence imposed by the High Court found that since the respondent did not offer any explanation whatsoever to rebut the presumption of trafficking, the presumption therefore stood unrebutted.This aligns with the principle laid down in *Yuvaraj*.

[55] We are of course mindful of the decision of the Supreme Court in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 1 CLJ (Rep) 311; [1991] 3 MLJ 169. We refer in particular to the following passages in the judgment:

> We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution's case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v PP* [1963] 1 MLJ 263; [1963] 1 LNS 82 go one step further before convicting the accused by giving due consideration as to why the defence story, though could not be believed, did not raise a reasonable doubt in the prosecution case. Thus, even though a judge does not accept or believe the accused's explanation, the accused must not be convicted until the court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt in the prosecution case. .....
>
> It is a well established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to cast a reasonable doubt in the prosecution case. In the course of the prosecution case, the prosecution may of course rely on available statutory presumptions to prove one or more of the essential ingredients of the charge. When that occurs, the particular burden of proof as opposed to the general burden, shifts to the defence to rebut such presumptions on the balance of probabilities which from the defence point of view is heavier than the burden of casting a reasonable doubt, but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt.

[56] It is clear that the judgment of Suffian J (as he then was) in *Mat v Public Prosecutor* [1963] 1 MLJ 263; [1963] 1 LNS 82 was the guiding principle in

the above decision. It also seems clear that the Supreme Court was speaking in terms of a case which had to be decided on the basis of the truth of the prosecution case as against the falsity of the defence story. But that is not the legal and factual matrix of the present case under appeal. What the court had to consider in the present appeal is whether the statutory presumptions under ss 37(d) and 37(da) of the DDA applied and had been rebutted.

[57] Indeed the Supreme Court in *Mohamad Radhi Yaakob* recognised that the quantum of proof required to rebut a statutory presumption is proof on the balance of probabilities. *Mat v Public Prosecutor*, it must be noted, does not involve any statutory presumption. It was a case of theft of two chickens and alternatively of dishonestly retaining a stolen chicken. Clearly the accused in that case had no duty to prove or to disprove anything, let alone a legal duty to rebut any statutory presumption. All that Mat had to do to earn an acquittal was merely to raise a reasonable doubt in the magistrate's mind as to whether or not he stole the two chickens or dishonestly retaining one of the chickens. It is in this legal and factual context that *Mohamad Radhi Yaakob* must be understood.

[58] Counsel's argument on the question of knowledge is that anybody could have left the drug in the drawer, particularly the appellant's friends or the hotel maid. According to counsel there is a real possibility that the drug was left behind by Hameed. To this argument we can only say 'of course it is possible but not in the least probable' (to borrow the words of Lord Denning in *Miller v Minister of Pensions* [1947] 2 All ER 372).

[59] The 'possibility' that counsel was speaking ofmust be tested against and in the light of the evidence that the appellant panicked when the search was in progress and in a state of shock and asking to be released when the drug was found. As alluded to earlier, this conduct is inconsistent with innocence. No plausible explanation was proffered by the appellant for behaving in this way other than to say that he was in shock because he realised by then that the plastic packet contained drug.

[60] The appellant denied ever taking drugs but the unchallenged and uncontradicted evidence is that he tested positive for methamphetamine. It is not surprising therefore that the learned trial judge disbelieved his explanation. The explanation could not have been sufficient to rebut the presumption of knowledge.

[61] In dealing with the defence case the learned trial judge's approach was to determine whether the appellant's explanation had cast a reasonable doubt in her mind as to the truth of the prosecution case. In doing so she had duly drawn

her attention to the requirements of s 182A(1) of the Criminal Procedure Code.

[62] Having looked at the totality of the evidence, the learned trial judge concluded that the appellant's defence was 'a fabrication concocted only at a late stage in his attempt to avoid culpability'. On the evidence before her, the burden of proof and the probabilities of the case, we found nothing wrong with this conclusion to warrant our intervention.

[63] In the circumstances we dismissed the appellant's appeal and affirmed the conviction and sentence.

Ahmadi Hj Asnawi JCA (dissenting):

[64] I have read the draft judgment of my learned brother Justice Abdul Rahman Sebli. I am on all fours with him except on the purport and application of s 37(d) of the Dangerous Drugs Act, 1952 ('the Act'), as set out in paras 38, 39 and 41 of the draft judgment.

[65] Indeed, of particular interest is His Lordship's proposition that once a positive finding of custody or control has been established, then the presumption of knowledge of the nature of the said drugs must be invoked against the accused pursuant to the second limb of s 37(d) of the Act until the contrary is proved by the accused person.

[66] At para 39 His Lordship alluded to the fact that since the trial judge's findings was that the drugs was in the appellant's possession at the time of his arrest, he must as a matter of common sense have had custody and control of the drugs as well. By operation of s 37(d) of the Act, he must be presumed to have had knowledge of the drugs.

[67] Whilst custody or control may be proved by direct evidence, knowledge, which is a mental element involving one's state of mind, undoubtedly is always difficult to prove by direct evidence in the absence of an express admission. However, it is trite that knowledge, though cannot be proved by direct evidence, it would be quite sufficient to prove facts from which it could be properly inferred that the accused knew or had the requisite knowledge that he had prohibited drugs in his custody or control as decided by a long line of cases – see *Wong Nam Loi v Public Prosecutor* [1997] 3 MLJ 795; [1998] 1 CLJ 37; *Emmanuel Yaw Teiku v Public Prosecutor* [2006] 5 MLJ 209; [2006] 3 CLJ 597; *Samundee Devan a/l Muthu Kerishnan v Public Prosecutor* [2010] 2 MLJ 607; [2010] 3 CLJ 269; *Public Prosecutor v Salleh bin Zakaria & Anor* [2010] 4 MLJ 25; [2010] 4 CLJ 671; *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337. These cases were all in similar

vein ie knowledge can be proved by inference from the surrounding facts and circumstances.

[68] I would hasten to add that this issue has been settled decades ago wherein Thomson J (as he then was) in *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237; [1956] 1 LNS 17, held that:

> There can be no possession without knowledge and knowledge cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such inference is infinite. There may be something in the accused's behaviour that shows knowledge, or the nature of the thing may be so obvious that it is possible to say 'he must have known what it was' or, again in cases under the Dangerous Drugs Ordinance, there may be a statutory presumption which fills a gap in the evidence.

[69] More recently the Federal Court in *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717, through Augustine Paul FCJ decided, at para 25 p 741:

> [25] The law is clear and well settled. Proof of knowledge is very often a matter of inference. The material from which the inference of knowledge can be drawn varies from case to case. It would be sufficient for the prosecution to prove facts from which it could be properly inferred that the accused had the necessary knowledge ...

[70] The presumption afforded by s 37(d) of the Act is an additional weapon at the disposal of the prosecution to prove possession and knowledge. Presumptions are to aid the prosecution to prove its case or to fill a gap in the evidence as adverted by Thomson J in *Chan Pean Leon v Public Prosecutor*. On account of the difficulty in proving knowledge by direct evidence and hence possession, the law allows the prosecution to resort to the aid of the said presumption. However, as seen from the authorities cited above, it does not and is not designed to ouster the prosecution's prerogative to prove its case (on possession and knowledge) by whatever means or in whatever manner it deems fit. Simply put the presumption does not preclude the prosecution from employing other means to prove knowledge of the nature of the said drugs on the part of the accused person.

[71] It is to be noted that in the appeal herein the trial judge's finding was that the appellant had actual mens rea possession based on the evidence adduced that the drugs were found in a drawer together with the accused's personal belongings, including his passport, in a hotel room rented under the appellant's name to which he was given a key. Upon prove of the same (actual mens rea possession), she went on to invoked the statutory presumption of trafficking in the said drugs under s 37(da)(xvi) of the Act.

[72] It is clear that the trial judge did not invoke the presumption under s 37(d) of the Act to attribute possession and knowledge of the said drugs on the part of the appellant. She was entirely correct. She is under no compulsion to invoke the said presumption where the totality of the evidence adduced is sufficient to prove possession and knowledge from the surrounding facts and circumstances. The proposition that the presumption of knowledge under the second limb of s 37(d) must be invoked on account that the appellant have had custody and control and hence possession of the said drugs is only relevant and applicable where the trial judge choose to invoke the said presumption to attribute possession of the said drugs by the appellant.

[73] Thus acquiescence to His Lordship's proposition would have the consequential effect of imposing limitations upon the prosecution's options to choose which presumption to apply on account of the prohibition against double presumption (the position of the law prior to the coming into effect of s 37A of the Act on 15 February 2014, allowing the application of double presumption). Needless to say, the presumption need not be applied where the evidence available is sufficient to prove knowledge.

[74] Equally the presumption under s 37(d) of the Act is not an automatic mechanism compelling the court to invoke the presumption of possession and knowledge once custody or control has been established. I could do no better than regurgitate the statement of the Federal Court in *Emmanuel Yaw Teiku v Public Prosecutor* [2006] 5 MLJ 209; [2006] 3 CLJ 597, which verily is on point:

> [14] Hence, under the Act there is no mandatory rule to require for the invocation of s 37(d) to establish the element of possession on a charge for trafficking of dangerous drugs. Where the facts and circumstances warrant, it would be sufficient to establish actual possession cum knowledge from the totality of the evidence adduced. As to the nature or kind of evidence required to show knowledge it would depend on the facts and circumstances of each case.

[75] In my view *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170 is not the authority to compel the automatic application of s 37(d) on account that where there is direct evidence to prove custody or control and knowledge of the drugs, the court may make a positive finding of possession independent of s 37(d) of the Act. The case merely prohibits the application of double presumptions under s 37(d) and 37(da) of the Act and to arrive at the presumption of trafficking under s 37(da) there should be a positive finding of actual possession of the drugs by the accused person by the trial judge.

[76] The ratio for the decision in *Muhammed bin Hassan* was explained by the Federal Court in *Public Prosecutor v Abdul Manaf bin Muhammed Hassan*

[2006] 3 MLJ 193; [2006] 2 CLJ 129, in the following terms:

> The ratio decided in *Muhammed bin Hassan* is clear. One cannot rely on the presumption of possession under s 37(d) of the Act to invoke a further presumption of trafficking under s 37(da) of the Act.

[77] Additionally, the Federal Court in *Emmanuel Yaw Teiku v Public Prosecutor* stated:

> Our observation of the above judgement makes it clear that where there was evidence of actual possession, the trial judge should make a positive finding that there was actual possession of the drug by the accused person and he should not invoke the presumption under s 37(d) of the Act. If a trial judge invoke s 37(d) of the Act to establish possession even though there was evidence of actual possession and went on to invoke s 37(da) to establish trafficking, it would be a serious misdirection.

[78] Hence it is not necessary upon the trial judge to invoke the presumption under s 37(d) where there is sufficient evidence of direct possession from which knowledge can be inferred from proved facts without resorting to the aid provided under the s 37(d) of the Act. The presumption under s 37(d) is only to enable the court to attribute knowledge where there is, under the circumstances, no direct evidence upon which an inference of knowledge can be drawn against the accused person.

[79] It is also trite that the presumption under s 37(d) of the Act is two pronged. It covers both the presumption of possession and presumption of knowledge as possession without knowledge is not possession in the criminal sense of the definition as suggested by the long line of authorities.

[80] The presumption of possession of the said drugs is in respect of any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drugs and not presumption of possession of any dangerous drugs found in the physical custody or control of the accused person. It would be completely absurd to mandatorily suggest the invocation of the presumption of possession over one who has been found to be in physical custody or control of the drugs.

[81] Hence it makes complete sense to have the presumption of knowledge of the nature of said drugs under the second limb of s 37(d) to run in tandem with the presumption of possession under the first limb of s 37(d) of the Act which was grounded solely upon proved custody or control of anything whatsoever containing dangerous drugs. Again, it is trite that mere custody or control without more is insufficient to attribute knowledge. The presumption

of knowledge is thus a requisition to complete the mental element of possession as required under our criminal law.

[82] As said earlier, in the appeal presently before us, the trial judge found that the appellant had actual mens rea possession and went on to find that once actual mens rea possession has been proved, the statutory presumption of trafficking in the said drugs under s 37(da)(xvi) can be invoked as the amount of the said drugs was in excess of the statutory limit. Henceforth she ordered the appellant to enter his defence on the charge of trafficking in the said drugs. The decision of the Federal Court in *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630 is on point and clearly fortified the reading and application of the law as applied by the trial judge. At para 37, Ahmad Hj Maarop FCJ stated:

> [37] ... the learned trial judge was right when he held that the prosecution had proved actual possession of the proscribed drugs against Siew. Having made the affirmative finding of possession, and as the amount of dangerous drugs in this case was more than 15 grammes, the learned trial judge invoked (and in our view rightly) the presumption of trafficking under s 37(da) of the DDA. In our judgement, the learned trial judge was right in calling upon Siew to enter his defence on the charge of trafficking against him.

[83] In the upshot, the issue of the appellant herein having to carry the burden of rebutting the presumption of knowledge (and possession) under s 37(d) did not arise as the trial judge, based on the facts and evidence before her had correctly decided not to invoke the presumption of possession and knowledge under s 37(d) of the Act. In such event to earn an outright acquittal, there are two imperatives which must necessarily be embedded in the defence of the appellant ie the burden to rebut, on the balance of probabilities, the presumption of trafficking under s 37(da) of the Act as the said presumption was invoked and/or the evidential burden to raise a reasonable doubt in respect of possession (mens rea) of the said drugs which encompasses the elements of custody or control, knowledge and the power of disposal if the need arises. Hence, it follows through that the issue of breaching the rule against double presumption on account that the presumption of trafficking in the said drugs under s 37(da) was invoked, is in fact a non-issue altogether.

My learned brother, Justice Mohtarudin Baki has gone through this draft. He is with me.

Appeal dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar